United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 12, 2001

TO : Rochelle Kentov, Regional Director

Region 12

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Wal-Mart Distribution Center

Case 12-CA-20749

This case, involving an alleged Section 8(a)(1) discharge of an employee preceded by an unlawful threat, was submitted for advice pursuant to Operations-Management OM 00-24.

We conclude, in agreement with the Region, that the Employer lawfully discharged employee Henriquez for using profanity and engaging in threatening behavior.

We assume, arguendo, that a prima facie violation may be established based upon (1) Henriquez's union activity a few weeks before his misconduct; (2) the Employer's knowledge in general of Henriquez's pro-union sympathies; and (3) the Employer's own anti-union animus. 1 Notwithstanding this arguable prima facie violation, we conclude that the Employer has established that it would have discharged Henriquez for his misconduct, without regard to any protected activity. In that regard, we note that (1) Henriquez did not deny his misconduct, to either the Region or the Employer; (2) the Employer provided written statements from three employee witnesses who described Henriquez's misconduct; and (3) these statements describe misconduct which is not materially different from the misconduct of numerous other employees whom the Employer also discharged within the last two years.

We also agree that it would not effectuate the purposes and policies of the Act to proceed on only the supervisory threat because it was an isolated incident, made by a low-level supervisor heard by a single employee, in the context of a no on-going union organizing campaign.

1 Employer knowledge and anti-union animus are both based upon a supervisor's statement to Henriquez around this same time. When Henriquez complained to the supervisor about the Employer's equipment, suggesting that the employees needed a union, the supervisor threatened that Henriquez

could lose his job.

B.J.K.